SEP 14 1990

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER, PRESBYTERY OF SEATTLE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER PRESBYTERY OF SEATTLE 1

BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 4

INTEREST OF AMICUS CURIAE 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Page

CASES

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 2

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2

Penna. Coal Co. v. Mahon, 260 U.S. 393 (1922) 6

RULES

Supreme Court Rule 37 1

Or. Admin. R. 660-15-000 (5) 5

UNITED STATES CONSTITUTION

Fifth Amendment 6, 7

Fourteenth Amendment 6

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This motion of Oregonians In Action (OIA) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been withheld by counsel for King County.

OIA is an Oregon non-profit corporation. It is deeply involved throughout the state of Oregon in protecting the

rights of private landowners against excessive land use regulations being imposed at all levels of government. It is actively involved in legislation, regulatory reform, litigation, research and education. It is in contact with tens of thousands of landowners through newsletters, bulletins, and other communication efforts. Our efforts are supported entirely by voluntary contributions of time and money.

OIA is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). OIA is also motivated by a strong belief that reasonable protection for private property is essential to maintain the resource allocation and efficiency functions of our market system. Moreover, OIA agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, OIA seeks to augment the arguments in the petition for certiorari by highlighting 1) the adverse impacts on landowners in Oregon which could flow from the Washington decision, and 2) the need to clarify and strengthen constitutional protection for private property. OIA believes the decision of the Washington Supreme Court is incorrect and poses a serious threat to property rights.

For the foregoing reasons, Oregonians In Action requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: September 14, 1990.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Oregonians In Action (OIA).

STATEMENT OF THE CASE

Oregonians In Action adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Oregonians In Action is deeply concerned over the extent to which regulators, responding primarily to pressure from special interest groups, are restricting the use of private land (without paying any compensation) to protect resources such as wildlife habitat, open space, and wetlands (much of which bears little resemblance to the swamps, bogs and estuaries which most people believed the wetlands program was intended to protect). For example, here is an excerpt from Goal 5 of the Oregon Land Conservation and Development Commission (Or. Admin. R. 660-15-000 (5)) which describes the "open space and natural and scenic resources" to be protected under Oregon's land use regulatory system:

"a. Land needed or desirable for open space;

b. Mineral and aggregate resources;

c. Energy sources;

d. Fish and wildlife areas and habitats;

e. Ecologically and scientifically significant natural areas, including desert areas;

f. Outstanding scenic views and sites;

g. Water areas, *wetlands*, watersheds and groundwater resources (emphasis added);

h. Wilderness areas;

i. Historic areas, sites, structures and objects;

j. Cultural areas;

k. Potential and approved Oregon recreation trails;

l. Potential and approved federal wild and scenic waterways and state scenic waterways."

This Goal 5 list of resources to be protected is so sweeping it could result in the "taking" of almost every acre of private rural land, and much urban land.

Many regulatory bodies and special interest groups are insisting regulatory powers be used instead of eminent domain to acquire such resources on private land for "public interest" purposes, literally making a mockery of constitutional protection for private property. This is exactly what Justice Oliver Wendell Holmes feared when he said: "When this seemingly absolute protection [for private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Penna. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Under current interpretations of case law on "takings" under the Fifth and Fourteenth Amendments, there are already very formidable, costly barriers to recovering compensation for regulatory "takings" or to securing other relief.

The decision, review of which is sought by Petitioner Presbytery of Seattle, would impose even greater barriers to recovery of compensation.

First, the Washington Court's "threshold inquiry" for reviewing constitutionality of land use regulations is a revolutionary concept. *Second*, the effect of such an approach will be denial of any opportunity to recover compensation for taking – the only possible remedy will be invalidation, which is totally in conflict with the "just compensation" command of the 5th Amendment. *Third*, the lower court's criteria for determining the "relevant unit" to be considered in takings analysis flies in the face of any reasonable interpretation of Constitutional protection for private property.

The Washington court's decision represents a sharp and radical break from historical precedents and undermines "regulatory taking" principles enunciated in those precedents.

CONCLUSION

The decision of the Washington Supreme Court denying compensation for a regulatory taking is a huge step backward at a time when there is a compelling need for forward steps to protect private property against regulatory takings. The decision, if not reversed, will become a persuasive precedent that could have widespread adverse impacts on property rights throughout the state of Oregon.

DATED: September, 1990.

Respectfully submitted,

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